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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

COMPUTER RESERVATIONS SYSTEM (CRS) REGULATIONS; STATEMENTS OF GENERAL POLICY; PROPOSED RULE	**Dockets Nos.**	**OST-97-2881 - 383** **OST-97-3014 - 141** **OST-98-4775 - 190** **OST-99-5888 - 66**

COMMENTS OF BRITISH AIRWAYS

Communications with respect to this document should be addressed to:

John Wood
Executive Vice President,
External Relations
BRITISH AIRWAYS PLC
Troonstrat/Rue du Trone 98
1050 Brussels, Belgium

Paul C. Jasinski
General Counsel, Americas
James B. Blaney
Senior Counsel, Americas
BRITISH AIRWAYS PLC
75-20 Astoria Blvd.
Jackson Height, NY 11370
347-418-4250

Don H. Hainbach
Katherine M. Aldrich
BOROS & GAROFALO, P.C.
1201 Connecticut Avenue, N.W.
Washington, DC 20036
202-822-9070

Attorneys for
BRITISH AIRWAYS PLC

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COMMENTS OF BRITISH AIRWAYS

British Airways welcomes the opportunity to comment on the Department's Notice of Proposed Rulemaking ("NPRM") on Computer Reservation Systems ("CRS").

The NPRM proposes to retain most of the CRS rules but eliminate or revise regulations that hinder competition. The revised rules would apply to all CRSs, regardless of ownership, but not to Internet distribution systems (airline websites, online travel agencies, etc.). The NPRM also proposes to eliminate the existing discriminatory pricing prohibition and the mandatory participation requirement.

British Airways strongly supports the objective of eliminating existing rules that hinder competition, especially the existing discriminatory pricing prohibition. However, the rules prohibiting bias, discriminatory functionality, and affiliated airline CRS incentives to travel agents should be retained, as should the mandatory participation requirement.

I. RETENTION OF THE CRS RULES IS NECESSARY TO MAINTAIN COMPETITION

While the four CRSs (Sabre, Galileo, Amadeus and Worldspan) may not be quite as dominant as when the rules were initially adopted in 1984, they unquestionably remain the

primary means of ticket distribution, and, as a result, still wield substantial market power. The NPRM notes that CRSs continue to exercise market power.

> Despite important changes in the industry, there is evidence that each of the systems continues to have market power against most airlines that could be used to distort airline competition and competition in the business of electronically providing airline information and booking capabilities to travel agents. The systems also still appear to have the ability to engage in practices that would mislead travel agents and their customers about the availability, price, and quality of airline service options.

67 Fed. Reg. 69368. Under these circumstances, the decision to maintain the CRS rules and extend their applicability to all CRSs, regardless of airline ownership, is necessary and appropriate.

The fact that there are new and innovative means to distribute ticket and airline information reflects the benefits of the current rules. While these new methods of ticket distribution are developing, however, they have yet to capture a substantial share of the market. According to DOT, travel agencies still sell 75% of all airline tickets and those travel agents make over 80% of their bookings through CRSs.[1] 67 Fed. Reg. 69369. Such a substantial share of the distribution market would enable the CRSs ample opportunity, if unregulated, to engage in display bias and other unfair methods of competition, including enhanced functionality and discriminatory subscriber incentives.

A. The rules prohibiting bias must be retained

The rule on display bias, which prohibits a CRS from arranging a screen display based on carrier identity, is perhaps the most basic of the CRS rules. The bias rule is critical because travel agents often book the first flight displayed on the CRS screen. Flights relegated to later screens may not even be seen by travel agents. The current rule, by

[1] For domestic bookings, this figure rises to over 90%.

prohibiting or at least limiting, display bias, enables travel agents and consumers to access neutral, accurate and complete information, resulting in purchase decisions based on objective criteria such as time of flight, fare levels, make of aircraft, type of service, etc.

So long as CRSs remain the dominant ticket distribution mechanism, it is essential that they display flights in a neutral fashion. CRSs' ability to favor one airlines' display could produce anticompetitive results. The anticompetitive potential would increase in the event of an affiliation between a CRS and an airline. If a CRS were able to preferentially list its affiliated airline, or prejudice the listing of its affiliate's competitors, it would be able to unfairly direct bookings to its affiliated carrier. The rules prohibiting display bias, which require each CRS to apply its editing and marketing criteria consistently, are designed to prevent the CRSs from engaging in such anticompetitive conduct. They have succeeded in that regard and must be retained.

B. Screen Padding should be eliminated

British Airways supports the Department's tentative decision to limit the number of times a code-share flight can be displayed. Code-sharing has multiplied the number of times a given flight is displayed. The existing rule does not limit the number or ways that a code-share flight can be listed. As a result, code-sharing carriers frequently list the flight under every possible combination, "padding" the screen and pushing competing flights onto later screens, resulting in a screen bias in favor of the code-share service. British Airways suggests that CRSs be prohibited from including more than two listings for any individual flight. That solution would minimize screen padding and would be consistent with current European Union requirements.

C. The rules prohibiting discriminatory functionality should be retained

As discussed above, the rule that prohibits a CRS from displaying its owner airline's flights in the most favorable screen positions must be retained. However, that rule only eliminates the most blatant type of bias. As the Department acknowledged when it reissued the rules in 1992, there is also potential for more subtle bias in CRS displays and architecture. To remedy this, DOT required airline-owned CRSs to treat all airlines participating in the system equally with respect to service enhancements and functionality. The DOT should retain those regulations in this rulemaking and make them applicable to all CRSs regardless of airline ownership.

The NPRM notes that the existing DOT rules regarding enhancements and equal functionality have not been the subject of complaint and are not unduly burdensome or unnecessary. DOT proposes to readopt them and apply them to all CRSs. In light of the demonstrated continued market power of the CRSs, British Airways concurs. Otherwise, a CRS could favor one airline over another by enabling the favored carrier to more easily and quickly load fare and schedule information. A CRS could further discriminate among carriers by making it easier for travel agents to manipulate screen displays and/or book tickets. The current rule prevents these practices by requiring that a CRS that offers any service enhancement to its owner airlines must offer that enhancement to all participating airlines on nondiscriminatory terms. In order to keep the playing field level and ensure that all airlines are treated equally by the CRSs this rule should be retained and applied to all CRSs.

D. The rules should prohibit an airline affiliated with a CRS from offering travel agents incentives to book through the affiliated CRS

Another manifestation of bias is the ability of the CRS to offer travel agents and large corporations incentives for booking on its owner/affiliated airline. This is a powerful marketing tool where that airline is the dominant carrier. Agents who want to secure the best fares for their customers would be forced to subscribe to that dominant airline's affiliated CRS. As most agents use only one CRS, the result would be that the agent would use that CRS for all of its sales, further solidifying the position of both the airline and CRS in that market.

This behavior is more than a theoretical possibility. The NPRM cites numerous examples. 67 Fed. Reg. 69395. In particular, Amadeus' September 22, 2000 comments in Docket OST-97-2881 (pp. 31-35) describe this problem in detail. An affiliated airline could also restrict a travel agency's access to marketing benefits, such as the ability to waive purchase restrictions or book frequent flyer tickets, unless the agency uses the affiliated CRS.

The current rule requires that each owner airline make all its fares and services that are "commonly available to subscribers of its own system" available to competing CRSs. However, airlines may assert that discount fares are not commonly available. Although DOT has heretofore declined to adopt a rule prohibiting a CRS's airline owner from tying access to special fares or discounts to use of its affiliated CRS, DOT stated that an owner airline would be in violation if it "widely offers a discount fare to businesses on the condition that they use its CRS for booking the fare." 57 Fed.Reg. 43801. The record in this proceeding

demonstrates that this admonition has failed to curb these practices. These tying arrangements are anticompetitive and DOT should prohibit them.

II. THE MANDATORY PARTICIPATION RULE SHOULD BE RETAINED

The mandatory participation rule requires owner airlines to participate in competing CRSs at the same level that they participate in their own CRS. The NPRM proposes to abolish this rule on the assumption that ending the rule may provide economic benefits because the CRSs may have to offer better terms to airlines for participation in the system. While the landscape has changed since DOT implemented the mandatory participation rule, many of the anticompetitive concerns that led to the rule in the first place are still present and its retention is the best means of creating a level playing field for airlines participating in CRSs.

A. The airline owned or affiliated CRSs retain market power and would limit their participation in competing CRSs absent a regulatory requirement

Airline ability to control or influence affiliated CRSs may be lessened today but it has not been eliminated. There is no need to test what the affiliated carriers would do without a mandatory participation rule - they still have the clout to revert to old anticompetitive habits. According to comments previously filed in this rulemaking some CRS-affiliated airlines are engaging in those practices now. 67 Fed. Reg. 69393 & 69395.

By contrast, smaller and unaffiliated airlines may have little or no ability to bargain for better terms. As the NPRM notes, it is the "large airlines" that oppose the requirement, arguing that they could obtain better terms if the rule did not dictate their level of participation. 67 Fed. Reg. 69393. If anyone has the ability to negotiate better terms it will be the large U.S. airlines that market or are otherwise affiliated with CRSs. Under the guise

of providing significant public benefits through reduced airline distribution costs, airlines affiliated with a CRS will cut their costs by reducing their level of participation in competing CRSs. The net result will be increased concentration and market dominance.

B. Parity Clauses should continue to be enforceable against affiliated airlines

Under the current rules, a parity clause that requires the airline to participate in the CRS at the same level it participates in any other CRS is prohibited, except that a CRS may require an airline that owns or is affiliated with a competing CRS to participate at the level that airline participates in its own or other CRSs. Elimination of this rule would also lead to greater carrier/CRS concentration and market dominance. Accordingly, it also should be retained.

C. CRSs should be prohibited from extracting compensatory fees in other markets

The market power of the CRSs is not limited to the U.S. market but extends to all distribution markets. If action is taken in the U.S. that may have the effect of reducing CRSs fees, the CRSs, absent a coordinated effort by the respective regulatory bodies, would be free to raise fees in other markets such as the EU. They might be tempted to seek compensation for the lost revenue in the U.S. market by exercising their power in other markets to offset lost revenue in the U.S. market. This would have a disproportionate impact on non-U.S. carriers. DOT should ensure that CRSs do not take action to unfairly subsidize sales in the U.S. market by raising fees in the EU and other markets. Otherwise, given the global character of airline networks, many benefits DOT seeks in its home market would be undermined or eroded. The Department should work with other regulatory bodies to develop a coordinated approach to CRS issues.

III. THERE IS NO NEED FOR A UNIFORM BOOKING FEE REQUIRMENT

A. The prohibition against discriminatory fees should be eliminated

To date, the DOT has declined to limit the level of booking fees, instead prohibiting CRSs from charging unreasonably discriminatory booking fees. In the NPRM DOT states that it remains reluctant to limit or regulate the level of bookings fees but proposes to eliminate the prohibition against discriminatory booking fees. British Airways supports the proposal to eliminate the prohibition against discriminatory fees.

The existing rules prohibit CRSs from charging different fees to different airlines for the same service in order to prevent airlines owning CRSs from imposing higher fees on its non-owner competitor airlines participating in the CRS. In practice, this has resulted in the airlines having no ability to negotiate for better terms out of concern they would be discriminatory. Several airlines, including American, United and KLM have urged the Department to eliminate this rule, arguing that they could obtain better terms from the CRS by negotiating in an unregulated market. 67 Fed. Reg. 69398. British Airways agrees.

B. Booking fees for passive bookings should be limited

As noted above, excessive booking fees are a significant problem for airlines. That problem is exacerbated when the fees are applied to passive bookings that do not produce any revenue for the carrier.

One possible solution to the problem would be to permit CRSs to charge fees only for transactions that result in issuance of a ticket or actual travel. The CRSs' productivity pricing clauses in subscriber contracts encourage travel agents to generate bookings to make their quotas. This pressure to meet or exceed the quota results in questionable passive bookings. Passive bookings can account for a considerable portion of an

airline's total bookings. The NPRM states that Aloha and Qantas claim that non-ticketed passive bookings account for eight to ten percent of their total bookings while Alitalia estimates 11%. Information submitted by Amadeus indicates that 17% of Galileo's and 42% of Sabre's total bookings were passive. 67 Fed. Reg. 69400. British Airways is well aware of the problem and takes aggressive action to reject and cancel passive bookings not linked to the issuance of a ticket. This is time consuming and costly and could be avoided if the ability of the GDS to charge for all passive bookings was curtailed. There is no justification for these practices which add unnecessary costs to the airline distribution system to the detriment of consumers.

British Airways urges the Department to address excessive booking fees and passive bookings.

IV. PROVIDING TRAVEL AGENTS WITH GREATER FLEXIBILITY TO USE ALTERNATIVE BOOKING METHODS PROMOTES COMPETITION

A. Greater contract flexibility and restrictions on penalty clauses in subscriber contracts will increase competition

The subscriber contract between the CRS and the travel agent is another area where CRSs continue to exercise market power. If unregulated CRSs could restrict competition by imposing terms in subscriber contracts that would make it practically impossible for a travel agent to use multiple CRSs, switch systems, or use alternative methods of distribution. By restricting the travel agents' flexibility, a CRS ensures that the agents must continue to rely on that particular CRS.

DOT recognized this problem and established rules that prohibit contract clauses that unreasonably prevented agents from using alternative booking channels.

Readopting the rules in 1992, DOT recognized that CRSs still wielded considerable power over travel agents. The readopted rules included provisions prohibiting minimum use clauses and requiring CRSs to offer shorter contact terms.

The NPRM proposes to readopt and strengthen the subscriber contract rules because the CRSs are still using their dominant position to force agents to use a particular CRS. Several large travel agencies in hub cities have stated that the dominant airline in their particular city is trying to force local agents to use the airline's affiliated CRS by denying agents the ability to book corporate discount fares on the airline unless booked on the affiliated CRS. Even more telling is the "about face" in the position of the largest travel agencies. 67 Fed. Reg. 69406. In the 1992 rulemaking many large travel agencies argued for the right to exempt themselves from the rules on subscriber contracts. Today these agencies are calling on DOT to impose even more stringent rules. 67 Fed. Reg. 69406. These types of contract provisions hinder competition and should be prohibited. DOT should strengthen the rules on subscriber contracts to curtail CRS dominance.

A particular concern regarding CRS market power is subscriber contract terms that prevent a travel agent from withdrawing. While CRSs have introduced shorter contract terms (three years) than the five years previously required, other contract conditions make the shorter term contracts commercially unsound for the majority of travel agents. See ASTA comments at 12. As a result, most travel agents opt for the five year contract.[2] While CRSs should be allowed a reasonable penalty for early termination, it should not be so excessive as to make it impossible for a travel agent to change (or add) CRSs. Accordingly, British

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[2] ASTA's December 1997 comments state that its survey showed that 83% of travel agents had five year contracts with CRSs.

Airways supports the proposal to amend the rules to prohibit liquidated damages that would reflect the loss of booking fees due to use of another CRS or alternative booking means. This will improve the bargaining position of travel agents to seek alternatives and enhance competition in the CRS-travel agent relationship.

The NPRM discusses several other approaches to strengthening the rules, including shortening the length of the maximum term of a subscriber contract to three years (down from five) and adopting the EU's rule on subscriber contracts. The EU rule allows a travel agent to terminate the subscriber contract without penalty after one year with sufficient notice. Another proposal would restrict or prohibit productivity pricing.

As discussed below, British Airways supports prohibiting productivity pricing provisions. That action, along with a shorter maximum contract term and a prohibition on contract clauses restricting travel agents' ability to use CRS equipment to access other sources of airline schedules and fares would improve the bargaining position of the agent and further enhance competition.

B. Productivity pricing provisions should be restricted

Productivity pricing provisions restrict the travel agents' ability to use an alternate CRS or other distribution channel. These provisions encourage a travel agent to make as many bookings as possible (including passive bookings) on one system, generating more revenue for the CRS. There is no benefit to consumers.

A preferable system would reward the travel agent for using a less expensive, faster, more efficient, or more accurate means of distributing tickets and airline information. For example, there may be a cost advantage to the consumer if the ticket is booked through

the airline's website or through an Internet travel site. CRS productivity pricing provisions create barriers to competition by making it commercially difficult for agents to use other more efficient distribution channels. British Airways supports the proposal to prohibit or limit productivity pricing.

V. THE CURRENT RULE ON MARKETING AND BOOKING DATA PROMOTES COMPETITION AND SHOULD BE RETAINED

British Airways supports retention of the existing requirement that CRS booking and marketing data ("MIDT") be available to all participating carriers. Making MIDT available to all participating carriers increases the efficiency of the market and is pro-competitive. Carriers can review fares and services of competing carriers in the marketplace and thereby compete more effectively. There is no issue of discrimination as MIDT is available on equal terms to all participating carriers. The current rule is an effective and pro-competitive means of distributing essential marketing information and should be retained.

The MIDT provided by the CRSs is the only reliable source of essential booking and marketing data. It is an essential marketing tool for airlines. It is used for route and network development purposes as well as for pricing and revenue management. The only reliable source of this data is the CRSs. Airlines have invested substantial resources in developing technologies to process this important data and enhance its utility. The current rule requires that MIDT be made available on non-discriminatory terms. The Department states that it is unwilling to regulate the fees charged for the MIDT and notes that the CRSs have incentive to provide the data to airlines and has already developed different packages of data at varying

prices. British Airways agrees that MIDT fees should be set by the marketplace and that the existing rule should be retained.[3]

If any restrictions on MIDT sales are imposed, they should be limited to domestic data. The only complaints about the use of MIDT relate to domestic transportation. If DOT wishes to limit access to this data, it can do so without restricting access to international data. Although alternative data sources may be available for domestic U.S. travel, -- *e.g.*, DOT's O&D reports -- no comparably reliable data is available for international travel. 67 Fed. Reg. 69404.

VI. INTERNET SITES PROVIDE A COMPETITIVE ALTERNATIVE TO CRS AND SHOULD NOT BE SUBJECT TO THE CRS RULES

Ticket sales through carriers' Internet sites have grown dramatically in the last few years and have been a key factor in blunting the market power of CRS. While Internet transactions may reflect a new avenue of distribution, in reality they are no different than calling a carrier's 800 line. The computer has simply replaced the telephone. The CRS regulations do not apply to telephonic transactions and there is no reason to for them to apply to electronic ones.

It is important to note that the CRS rules were only adopted after the CRSs had been operating for years and after extensive studies by DOT and DOJ had raised serious concerns about their anticompetitive impact on airline competition. Order 83-8-195. There is no documented concern about carrier websites.

Similarly, CRS regulations should not be extended to on-line distributors or ticket agencies. While issues have been raised regarding possible bias on on-line sites the potential

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[3] The EU is reviewing whether group purchases of MIDT data should be permitted. British Airways suggests that DOT may wish to consider this issue as well.

for harm to the consumer is substantially less than from bias in a CRS. Moreover, the maturity of the marketplace today with technology driven market-solutions and emerging distribution alternatives warrants regulatory restraint in this area. As DOT states, while a travel agent typically reviews one CRS, the consumer on the Internet can check multiple on-line sites, including carrier sites. Moreover, unlike a CRS, the on-line agency may not display or be able to book all airlines thus limiting its ability to wield power in the market. Absent demonstrated harm to airline competition there is no reason to extend the rule to online agencies and ticket sites.

VII. CONCLUSION

British Airways supports the objective of modifying the existing rules by eliminating those provisions – particularly the discriminatory pricing prohibition – that hinder competition and limit normal market forces. However, the rules prohibiting bias, discriminatory functionality, and affiliated airline CRS incentives to travel agents should be retained, as should the mandatory participation requirement.

Respectfully submitted,

Don H. Hainbach
Katherine M. Aldrich
BOROS & GAROFALO, P.C.
1201 Connecticut Avenue, N.W.
Suite 550
Washington, DC 20036

Attorneys for
BRITISH AIRWAYS PLC